

IN THE UNITED STATES DISTRICT COURT  
FOR THE NORTHERN DISTRICT OF TEXAS  
FORT WORTH DIVISION

ERNEST JOHNSON  
Plaintiff,

Vs.

BRAUM'S, INC.  
Defendant.

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NO. 4:23-cv-00967-P

**FIRST COMPLAINT FOR PERSONAL INJURY DAMAGES- DEMAND FOR JURY  
TRIAL**

Plaintiff, Ernest Johnson (“Johnson” or “Plaintiff”), brings this complaint against  
Defendant, Braum’s, Inc. (“Braum’s” or “Defendant”) and alleges as follows:

**INTRODUCTION**

1. Braum’s is an Oklahoma corporation that owns and operates a chain of ice cream parlors and fast-food restaurants in Texas and other states. Ernest Johnson is an individual who resides in Weatherford, Parker County, Texas.
2. In 2021, Braum’s produced and sold to consumers a flavor or type of ice cream identified as “Braum’s Premium Caramel Cone” (“Caramel Cone”).
3. Pictured on a carton of Caramel Cone produced by Braum’s was ice cream along with fragments or shards of ice cream cones.
4. In August 2021, Plaintiff purchased a carton of Caramel Cone and sometime thereafter began to consume its contents. After swallowing the ice cream embedded with shards or fragments of ice cream cone, Plaintiff suddenly experienced a sharp pain in his chest.

5. Plaintiff was immediately taken to the emergency room in Weatherford, Texas and later transferred to a higher-level hospital in Plano, Texas where he was diagnosed with a perforated esophagus. This is a civil action seeking damages under the Texas common law theories of strict liability and negligence.

#### JURISDICTION AND VENUE

6. This is a civil action that falls under the court's original jurisdiction pursuant to 28 U.S.C. §1332 and was properly removed to this court based on diversity of citizenship in accordance with 28 U.S.C. §§ 1441, 1446.
7. Plaintiff is a citizen of the State of Texas and Defendant is an Oklahoma corporation. As a result, complete diversity of citizenship exists between the parties in accordance with 28 U.S.C. § 1332.
8. The amount in controversy in this action exceeds \$75,000.00 dollars and thus satisfies the diversity requirements of 28 U.S.C. § 1332.
9. The incident that gave rise to Plaintiff's causes of action occurred in Weatherford, Parker County, Texas. Thus, venue is proper in this court because the Fort Worth division of the Northern District of Texas is the United States District and Division encompassing Parker County.

#### PARTIES

10. Plaintiff is a citizen of Texas and a resident of Weatherford, Parker County, Texas.
11. Defendant is an Oklahoma corporation located in Oklahoma County, Oklahoma at 3000 N.E. 63<sup>rd</sup> Street Oklahoma City, Oklahoma.

#### FACTUAL BACKGROUND

12. Plaintiffs claims arise out of his consumption of ice cream produced, marketed, and sold by Braum's. In August, 2021, Plaintiff purchased a carton of Caramel Cone ice cream which had pictured on the carton ice cream along with pieces or shards of ice cream cones. On August 12, 2021, Plaintiff opened the carton of Caramel Cone previously purchased from Braum's and began to consume its contents. After breaking a large portion of cone with his teeth and swallowing, he immediately experienced a sharp pain in his chest which he described as being similar to being stabbed by a knife. He also noticed that his chest cavity and stomach immediately expanded.
13. Thinking that water would resolve his condition, he drank a large glass of water which immediately intensified his pain and expanded his chest cavity further. Plaintiff was immediately rushed to Medical City Weatherford, a hospital located in Parker County, Texas. After admission, an endoscopy reflected that his esophagus had been perforated and that the Plaintiff needed a higher level of care than the hospital in Weatherford could provide.
14. A request was immediately made by the Weatherford hospital through the Hospital Transfer Center for the Plaintiff to be transferred to a hospital with a higher level of care in order to treat and repair an esophageal perforation. Plaintiff was finally accepted as a patient at Medical City Plano, located in Plano, Collin County, Texas and was transferred approximately 75 miles by medical helicopter for admission to that hospital.
15. Plaintiff was admitted to Medical City Plano in critical condition on August 12, 2021. He was treated at the hospital from the date of his admission until September 17, 2021, when he was released.

16. After surgical treatment and repair of his esophageal perforation, surgeons informed Plaintiff that they had found and identified shards of ice cream cone which they concluded, if frozen, would have been as sharp as a razor blade or a piece of broken glass.
17. There can be no other conclusion that the frozen cone in the Caramel Cone was a direct and proximate cause of the perforation of the Plaintiff's esophagus.
18. On information and belief, Braum's no longer produces or sells to the public Caramel Cone.

### CAUSES OF ACTION

#### Strict Liability and Negligence

The allegations contained in paragraph's one through eighteen are hereby realleged as is fully set forth herein.

19. Under the common law of the State of Texas, it has long been established that when food products are sold for consumption and are unfit for that purpose, the law imposes a warranty of purity in favor of the ultimate consumer as a matter of public policy.
20. Plaintiff alleges and will prove that the injury which he sustained was caused by the unwholesome and unfit condition of the food he purchased and consumed from Defendant.
21. The Caramel Cone produced by Defendant was, at the time it left the sellers hands, in a condition not contemplated by Plaintiff which was unreasonably dangerous to him.
22. Plaintiff will further prove that Defendant was negligent in the production of ice cream which contained shards or pieces of ice cream cone that had the potential to perforate a consumer's esophagus.
23. Plaintiff would further allege Defendant's negligence was the proximate cause of Plaintiffs injuries and damages.

WHEREFORE, Plaintiff respectfully requests that the Court:

- a. Award Plaintiff compensatory damages under the Texas common law theory of Strict Liability;
- b. Award compensatory damages under the Texas common law theory of Negligence;
- c. Grant Plaintiff any other and further relief the court deems just and proper.

Dated: November 13, 2023.

Respectfully submitted,

/s/ Robert M. Burns

ROBERT M. BURNS

SBN: 03452200

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**CERTIFICATE OF SERVICE**

I hereby certify that I electronically filed the foregoing with the Clerk of the Court for the United States District Court for the Northern District of Texas by using the CM/ECF system on November 13, 2023. I further certify that all participants in the case are registered CM/ECF users, and that service will be accomplished by the CM/ECF system.

/s/ Robert M. Burns

Robert M. Burns